Supreme Court, U.S.
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No. 99-80

In The

# Supreme Court of the United States

October Term, 1998

FRANCES CALLAHAN,

*Petitioner,*

v.

SUFFOLK COUNTY DEPARTMENT OF SOCIAL SERVICES,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

## PETITIONERS REPLY BRIEF

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## PRELIMINARY STATEMENT

Petitioner Callahan files this Reply to the Suffolk County Department of Social Services (SCDSS) Brief in Opposition.

## FACTUAL DISPUTES

The petitioner responds to the respondent's allegations that the petitioner made misstatements in the petition.

**1. Petitioner Callahan did not ignore the lien at time of settlement.** The respondent argues that the petitioner ignored the agency's Medicaid lien. "Callahan ignored the Program's lien at the time of the settlement, and now attempts to use that misdeed as a functional fact to distinguish her case from all others." SCDSS at p. 3.

SCDSS had actual knowledge of the lawsuit when it filed its lien Notice on the defendants. See the April 10, 1985 lien Notice R. 164 in the Record below. At the settlement conference, the trial court vacated the lien and allocated the settlement for pain and suffering. All assets then passed to the plaintiff.

The SCDSS has chosen not to appeal the trial court's Order vacating the Medicaid lien. Had there been any issue of SCDSS' not being notified of the date of the settlement conference, and had there been any likelihood that the court would have changed its allocation or decision, the SCDSS could have filed a Motion with the trial court to vacate its Order discharging the lien. During this period of time, Petitioner Callahan had no authority to disobey the trial court's Order. Indeed, there was no authority for Justice Kassoff, the 1993 Guardianship court to dishonor the trial court's unmistakable Order vacating the Medicaid lien. Over six years of litigation have now passed and the SCDSS has never explained why the obvious Motion to vacate the trial court's Order was never filed if they indeed never had knowledge of the settlement conference and believe that their presence would have somehow made a difference in the court's determination that this entire award should be allocated for pain and suffering.

The trial court settled a case in which the plaintiff had catastrophic injuries, but in which there were liability problems. In addition, the trial court knew that the plaintiff would have difficulty collecting damages from the defendants. The bulk of the settlement, $200,000, was paid by the Superintendent of the State of New York as Liquidator of Professional Insurance Co. of New York Property & Casualty Ins., Security Fund Account due to the death or insolvency of one of the defendants.

In the trial court's Order of August 12, 1991, the court considered all relevant factors, including the severity of the damages to the plaintiff and the strength of plaintiffs case against the defendants, when approving a Compromise Order for the incapacitated plaintiff. The trial court explicitly determined that the settlement did not include any monies to be paid to SCDSS. "ORDERED, that the lien of the Suffolk County Department of Social Services against FRANCES CALLAHAN be and the same is hereby discharged and dissolved." The court also determined that the entire net settlement should be paid to FRANCES CALLAHAN for the pain and suffering that she must endure for her lifetime. "ORDERED, that all of the proceeds of the settlement be and hereby are allocated to compensate the plaintiff Frances Callahan for her pain and suffering." R. 27. Petitioner's Appendix B. There is no suggestion that the experienced trial judge was duped by a "collusion of the parties" to defeat the Medicaid lien. See Gromalski v. County of Nassau, 614 N.Y.S. 2d 192 (App. Div. 2 Dept. 1994).

The Court should also note in the pending New York State case appealing the Second Circuit's decision in Sullivan v. County of Suffolk, 174 F. 3d 282 (2d Cir. 1999). Docket No.99-184, petitioner Sullivan makes the same legal arguments as petitioner Callahan. In Sullivan, there is no question of fact as to the knowledge of the Medicaid agency of the tort settlement as the same SCDSS participated in the settlement negotiations conducted by Judge Seybert in which the County of Suffolk, itself, was the defendant.

**2. Petitioner did fear that the settlement was at risk.** At the respondent's n. 3, the respondent alleges that the petitioner made

a false representation in stating that she feared that the settlement proceeds were at risk. "Thus, Petitioner's assertion, at page 4, and again at page 5, that she "realized that a tort settlement of $244,00 was at risk of being quickly exhausted by paying for her daughter's extraordinary health care needs, is quite false." SCDSS, at p. 3.

Patricia Callahan knew that the settlement monies were at risk because the monies were paid from the defendants to Frances Callahan's tort counsel's escrow account subject to the jurisdiction of the Queens County Supreme Court. In the pre-OBRA 1993 period, without a Supplemental Needs Trust, once the funds were distributed from the tort counsel's escrow account and a decision was made by the Committee to expend the money that was under the jurisdiction of the Court, the agency could deny Medicaid because there would have been an expenditure of assets that could be otherwise used to pay her medical needs. See Navarro by Navarro v. Secretary, 751 F. Supp. 349 (E.D.N.Y. 1990). Hence, the inquiry letter to the First Lady seeking a solution to the conundrum of all Medicaid recipients who receive court ordered tort settlements.

In her September 30, 1993 response, Medicaid Director Richardson responded to Patricia Callahan's inquiry by advising that Patricia Callahan should use a Supplemental Needs Trust. "You had asked whether anything could be done, on a Federal level, to permit the creation of special needs trusts for severely handicapped children in a way that, presumably, would not cause them to lose Medicaid." Petitioner's Appendix E.

The October I, 1993 effective date of OBRA 1993 solved Patricia Callahan's conundrum. Prior to that date, the SCDSS knew that the use of Supplemental Needs Trusts had been a hotly contested issue in the State of New York. In 1991, Justice Kassoff, the Guardianship justice later hearing the Callahan Guardianship Petition, decided Hughes v . Physician's Hospital, 566 N.Y.S. 2d 496 (Sup. Ct. Queens Co. 1991). This case authorized a trust for a Medicaid/SSI recipient based upon the 1988 federal law which repealed the transfer of assets prohibition for community based disabled individuals. However, this decision was not being

followed by other courts in New York State. See In re Moretti, citing the cases that were contrary to the Hughes decision. In re Moretti, 606 N.Y.S. 2d 543 (Sp. Ct. Kings Co. 1993).

After the OBRA 1993 October I, 1993 effective date, rather than move to vacate Justice Doyle's Order discharging the Medicaid lien, the SCDSS sought to force the exhaustion of those assets by terminating the Medicaid benefits. See the SCDSS October 7, 1993 Notice of Intent to Discontinue Medical Assistance, Reply Appendix A. The local Medicaid agency subsequently withdrew the denial Notice and has continued to provide Medicaid benefits through this lengthy appeal process. Had Medicaid been denied, all remaining assets would have been used to pay for the basic care of FRANCES CALLAHAN. It is estimated that assets would have been depleted within 2 years. After that time, FRANCES CALLAHAN would once again be a Medicaid recipient with no funds held in reserve for her special needs.

**3. The Petitioner did not misstate the "Richardson Memorandum"** The SCDSSS argues at p. 3-4 that an additional paragraph from the June 5, 1996 "Richardson Memorandum " sent to the State Medicaid Directors, supports the Medicaid agency's argument that Secretary Shalala intended that the Medicaid eligibility be lost if the funds are placed in a Trust to thwart the use of these funds for the payment of Medicaid needs.

The petitioner argues that the Richardson memo establishes an allocation standard by which assets of a third party not intended to pay for medical care may be placed in a trust. In the case of Frances Callahan, as the trial court found that no proceeds were intended to pay for medical care and that all were intended to compensate FRANCES CALLAHAN for pain and suffering, petitioner would not run afoul of the Richardson letter if it were applied in this case. However, as decided by the New York State Court of Appeals, even recovery funds not intended to compensate for medical expenses must be used to first pay in full for medical care furnished by the Medicaid program by satisfying the Medicaid lien. In the case of FRANCES CALLAHAN, she will have no funds remaining to fund the Supplemental Needs Trust authorized by federal law.

## PETITIONER'S RESPONSE TO RESPONDENT'S LEGAL ARGUMENTS

The petitioner replies to the respondent's legal arguments:

**POINT I:** At respondent's POINT I, the SCDSS cites to the State's lien law and provides a copy of Social Services Law § 104-b at respondent's Appendix. SCDSS cites to the State statute and makes an unarticulated federalism argument. "Under the broad statutory federal mandate to seek reimbursement from responsible third parties, there is no justification for limiting the New York State Program in its efficacious use of the lien procedure." SCDSS, at p. 9.

Petitioner most respectfully submits that this is the Supremacy Clause question presented to the Supreme Court: did the State of New York's implementation of SSL § 104-b violate the federal Medicaid anti-lien statute? The petitioner argues that, contrary to the SCDSS argument, the New York State Legislature clearly intended at SSL § 104-b(12) that the State's receipt of Medicaid funds should not be at risk by the enforcement of the State's lien statute and, therefore, there is no federalism issue:

> The provisions of this section to the contrary notwithstanding, the lien herein created shall not apply with respect to any claim or benefits payable to the recipients of any form of public assistance or care, part of which is paid for by the government of the United States or any agency when in the opinion of the commissioner. such lien would jeopardize the continuation of such federal contribution. Emphasis Added.

The petitioner argues that this is a Supremacy Clause case and that this Court's recent federalism decisions do not apply. See Alden v. Maine, _ U.S._ (1999), 119 S. Ct. 2240, College Savings Bank v. Florida Prepaid Post Secondary Education Expense Board,_ U.S._(1999), 119 S. Ct. 2219, Florida Prepaid Post Secondary Education Expense Board v.College Savings Bank,_ U.S._ (1999), 119 S. Ct. 2199.

The petitioner argues that this is not a federalism case because the New York State Legislature explicitly incorporated its

own fail-safe standard to comply with federal Medicaid law so as not to place at risk the federal government's contribution to the State's Medicaid program. The Legislature's use of the SSL § 104-b(12) statutory escape pill has no other purpose than to protect the State's receipt of the federal contribution to the State's Medicaid program. The State Legislature did not intend that the implementation of the State's lien law become a poison pill that would trigger the federal government withholding federal funds if there was a violation of the federal anti lien statute or federal assignment statute. This was a well grounded fear because the federal government has docked the State of California 7.5 million dollars because in its third party recovery program the State was not recovering the federal government's share of the reimbursement directly from the defendants. See the description of California's fiscal plight in the unappealed Indiana decision, In re Wade, 711 N.E. 2d 851 (Court of Appeals Indiana 1999). In the unappealed Wade decision, the court held that an "allocation" standard was the appropriate standard to apply when there is a Medicaid lien.

Therefore, using the SCDSS' own federalism argument, this is an appropriate case for the Court to grant the petition in order to determine whether the federal anti-lien statute violates the principle of federalism. This is an issue that affects all 50 States. See the pending petition for a writ of certiorari, McNeil v. State of Utah Medicaid Section. Docket No. 98-1729. Hence, these cases provide the Court with an opportunity to draw a bright line distinction between its new federalism standard and the Supremacy Clause standard as applied to the Medicaid program that affects millions of citizens in all 50 States.

**POINT II:** The respondent argues that this case presents no conflict with the Supremacy clause and cites to the federal anti-lien statute. The respondent then again admonishes Guardian-mother Callahan for not fulfilling her statutory duties. "To the extent that her possession of the fund is at all operational to her argument, it is a fact created by her own misdeed in failing to cooperate in recovery efforts, a requirement of eligibility.", SCDSS at p. 13. The agency's admonishment is supported by a

citation at n. 7, p. 3 to 42 C.F.R § 433.147 (b)(4).

In this case, SCDSS' lien was dissolved by the trial court. Patricia Callahan argues that it is the State Medicaid program that is the wrongdoer by not obeying the federal regulatory scheme clearly laid out in 42 C.F.R. § 433.147. Patricia Callahan's regulatory duty was to assign the cause of action to the Medicaid agency, 42 C.F.R.§ 433.145, and then assist the agency to recover from the legally liable third party, 42 C.F.R.§ 433.147. Patricia Callahan performed her duty by filing the lawsuit against the defendants and assigning to the Medicaid agency its claim for reimbursement for medical expenses from the defendants. However, the Medicaid agency did not perform its regulatory duty and sue the defendants as assignee and collect the monies for which the defendants were liable for the medical expenses of the plaintiff. Instead, with a lien dissolved by the trial court, they have encumbered the proceeds used to fund the Supplemental Needs Trust. Petitioner Callahan performed no "misdeed" in receiving a tort settlement in which the trial court dissolved and discharged the lien.

**POINT III:** The respondent argues that the petitioner's reliance on the "literal text" standard of Brogan v. United States, 522 U.S. 398, is inapt because it destroys the meaning of the Medicaid eligibility statute. SCDSS at p. 16. In response, the petitioner reiterates her argument as to the remedial trust statute that required a payback upon death. Petitioner asserts that when Congress used the work "total" , the Congress meant "total" deferral and "total" payback only upon death.

As to the "literal text" standard being applied to the assignment statute, the respondent's argument is most revealing. SCDSS now backpedals from its own "contextual text" argument that the meaning of a single word should not destroy another provision of the complicated Medicaid statute. SCDSS makes the negative argument that nowhere in the federal collection statute does it explicitly require the Medicaid agency to pursue liable third parties for payment. "It does not even require the program to pursue liable third parties for payment." SCDSS at p. 18.

SCDSS then hammers home its point by arguing that there

is no explicit definition within the assignment statute of the word "pursuit" as applied to lawsuits against defendants. "No reference to "direct actions" is found anywhere in the statute. In fact no particular recovery device is mentioned at all." SCDSS at p. 18.

The petitioner argues that the overall intent of Congress could not be clearer: the State Medicaid agency must require the Medicaid recipients to assign their cause of action for recovery of medical expenses to the Medicaid agency; the Medicaid agency has a duty to collect its recovery from the person liable for the Medicaid expenditures; and the State Medicaid agencies are prohibited from placing liens on Medicaid recipients assets. The petitioner makes the SCDSS "contextual text" argument that the fact there is the absence of an explicit statutory requirement that the Medicaid agency sue the defendants, does not mean that Congress did not intend that this remedy be used by he Medicaid agencies to collect reimbursement from legally liable defendants.

The petitioner respectfully submits that the key legal issue that needs to be resolved by this Court is nicely drawn in SCDSS' POINT III: were the funds in the name of Guardian-mother Callahan in fact the defendants' funds which were owed to SCDSS? The petitioner agrees with SCDSS that if these funds are the defendants' funds, then Medicaid can place a lien on the defendants' funds. However, the petitioner argues that the funds were the plaintiffs, as determined by the trial court.

If this Court does not grant the petition, then the State of New York can recover directly from Guardian-mother Callahan by seizing all of Frances' tort settlement based on the New York State Court of Appeals' Callahan decision. Hence, this case raises the issue of whether to apply the "literal test" standard or the "contextual text" standard to the remedial Medicaid statute in which the Congress encouraged Medicaid recipients to initiate lawsuits and then place settlement proceeds into payback Supplemental Needs Trusts.

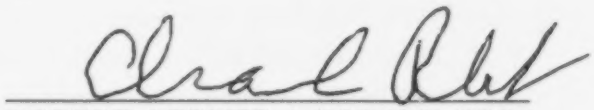
If the Callahan Court of Appeals decision remains the law in the State of New York, plaintiffs like Frances Callahan will not bring lawsuits because there is no beneficial interest from their settlement. The remedial OBRA 1993 statute explicitly authorized

by the New York State lien law, which requires payment in full of a Medicaid lien from all of a lawsuit settlement. This interpretation is contrary to the federal law which directs reimbursement only from those liable to provide medical support. In the case of Frances Callahan, the trial court found no part of the settlement was intended to compensate Frances Callahan for medical expenses. That allocation standard now has been replaced with a priority for the state.

## CONCLUSION

The two other petitions now pending before the Court raise the same issue whether the federal anti-lien statute prohibits Medicaid agencies from placing liens on the tort proceeds paid by defendants to Medicaid recipients. Sullivan v. County of Suffolk, Docket No. 99-184, and McNeil v. State of Utah Medicaid Section, Docket No. 98-1729. The issue of whether a Medicaid lien can be satisfied from the settlement funds received by the plaintiff-Medicaid recipients affects every pending and putative tort action by any Medicaid recipient residing in any of the 50 States. The Callahan facts, in which the Medicaid lien is greater than the settlement, highlights the need for the Court's review in order that Medicaid plaintiffs can make reasoned decisions as to whether the travail of a lawsuit is worth the effort if there is no economic benefit to the plaintiff-victim. Therefore, Guardian-mother Callahan most respectfully requests that the Court grant her petition.

Dated: Rockville Centre, New York
September 7, 1999



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# APPENDIX A

**DSS-3623** **MA Only**

## NOTICE OF INTENT TO DISCONTINUE/CHANGE MEDICAL ASSISTANCE

| | | |
|---|---|---|
| NOTICE DATE: **10/7/93** | EFFECTIVE DATE: **10/31/93** | NAME AND ADDRESS OF AGENCY/ CENTER OF DISTRICT OFFICE<br>**SCDSS**<br>**P O BOX 2000**<br>**HAUPPAUGE, NY 11788** |
| CASE NUMBER<br>**M009 03960** | CIN/ RID NUMBER<br>**AM62853D** | GENERAL TELEPHONE NO. FOR QUESTIONS OR HELP 853-2220 |
| CASE NAME (And C/O Name if Present) AND ADDRESS<br><br>Frances E. Callahan<br>UCP ICF 249-08 Grand Central Pkwy<br>Bellerose, NY 11426 | | OR Agency Conference<br>_____<br>Fair Hearing information and assistance<br>_____<br>Record Access<br>_____<br>Legal Assistance information<br>_____ |

| | | |
|---|---|---|
| OFFICE NO.<br>**W** | UNIT NO.<br>**WCC** | WORKER NO.<br>**W8857** |
| UNIT OR WORKER NAME<br>**Lucille Strafers** | TELEPHONE NO.<br>**853-2220** | |

This is to advise you that the Department intends ti take the action(s) indicated on your Medical Assistance case:

☐Change

☐ We will ☐ Increase ☐ Decrease the amount the Medical Assistance household must spend or incur on medical expenses each month in order to receive Medical Assistance coverage, based on the following calculations:

Gross Monthly Income $_____

Total Deductions $_____

Balance $_____

Allowable Income Standard $_____

New Monthly Excess Income $_____

New Excess Income (six months) $_____

The former monthly excess income amount was $_____

The former excess income amount was $_____

☐ We will change the manner in which we compute the Medical Assistance spenddown as follows:

Gross Monthly Income $_____

Total Deductions $_____

Balance $_____

Allowable Income Standard $_____

Excess Income (monthly) $_____

Excess Income (six months) $_____

These calculations **do not** result in any change in the amount you must spend or incur on medical expenses each month in order to receive Medical Assistance coverage for the eligible individuals.

This change is effective _____and is being made as a result of:

☐ Change in income as follows: _____

_____

☐ Other (non-financial) change in circumstances: _____

☐ DISCONTINUE the Medical Assistance coverage for (name(s)FRANCES E. CALLAHAN effective 10/31/93 because: EXCESS RESOURCES

The LAW(S) AND/OR REGULATION(S) which allows us to do this is 360 -4.7(a) & 360-4.8(b).

If any of these actions were taken because of financial circumstances, we have enclosed a budget worksheet(s) so that you can see how we determined eligibility for benefits.

**ATTENTION:** Persons receiving Medical Assistance may be eligible for a discount on their telephone service. For information on LIFELINE, call New York Telephone, toll-free at 1-800-555-5000.

REGULATIONS REQUIRE THAT YOU IMMEDIATELY NOTIFY THIS DEPARTMENT OF CHANGES IN NEEDS, INCOME, RESOURCES, LIVING ARRANGEMENTS OR ADDRESS

**YOU HAVE THE RIGHT TO APPEAL THIS DECISION**

**CLIENT COPY**